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Good Day Amy and Michael,

Attached is the Navy's markup of the draft ETCA, as compared to SFRA's 12/11/08 version (transmitted 12/18/08). Our team looks forward to discussing it with you next week.

--Thomas M.

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EARLY TRANSFER COOPERATIVE AGREEMENT

**COVERING PORTIONS OF
HUNTERS POINT NAVAL SHIPYARD
CONSISTING OF PARCEL "B" AND PARCEL "G"**

BETWEEN

**THE UNITED STATES OF AMERICA
DEPARTMENT OF THE NAVY**

AND

**THE SAN FRANCISCO REDEVELOPMENT AGENCY,
SAN FRANCISCO, CALIFORNIA**

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

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TABLE OF CONTENTS

CLAUSE NUMBER	CLAUSE NAME	PAGE NUMBER
None	<u>GENERAL PROVISIONS</u>	5
<u>ARTICLE I</u>	<u>SCOPE AND PURPOSE</u>	7
Section 101	Performance of Environmental Services	7
Section 102	Performance Method	7
<u>ARTICLE II</u>	<u>DEFINITIONS</u>	7
Section 201	Cooperative Agreement	7
Section 202	Navy’s Representative	7
Section 203	SFRA	8
Section 204	Hunters Point Navy Shipyard	8
Section 205	Administrative Order on-f Consent (“AOC”)	8
Section 206	Navy-Retained Conditions	8
Section 207	CERCLA Record of Decision	8
Section 208	Regulatory Closure	9
Section 209	Navy and Government	9
Section 210	Long-Term Obligations	9
Section 211	Environmental Services	9
Section 212	Known Conditions	9
Section 213	Unknown Insured Conditions	9
Section 214	Unknown Uninsured Conditions	10
Section 215	Radiological Materials	10

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

Section 216	Environmental Insurance Policies	10
Section 217	(Reserved)	10
Section 218	Ineligible Work	10
Section 219	Redevelopment Activity	12
Section 220	Reuse Plan	12
Section 221	Reasonably Expected Environmental Conditions	12
Section 222	Area Covered by Environmental Services	13
Section 223	Unexploded Ordnance / Munitions Explosive Concern	13
Section 224	Military Munitions	13
Section 225	Navy Obligations	13
Section 226	Regulatory Oversight	13
Section 227	Regulatory Enforcement Activities	14
Section 228	Grants Officer	14
Section 229	Environmental Regulatory Agency or Agencies	15
Section 230	Covenant to Restrict the Use of Property	15
Section 231	Amended Federal Facilities Agreement	15
<u>ARTICLE III</u>	<u>OBLIGATIONS OF THE PARTIES</u>	15
Section 301	Obligations of the SFRA	15
Section 302	Obligations of the Navy	17
<u>ARTICLE IV</u>	<u>FUNDING LIMITATION AND BUDGETING</u>	19
Section 401	Navy's Funding Limitation	19
<u>ARTICLE V</u>	<u>PAYMENT SCHEDULE</u>	19
Section 501	General	19
Section 502	Payments	19
<u>ARTICLE VI</u>	<u>PAYMENT</u>	20
Section 601	General	20
Section 602	Relation to Prompt Payment Act	20
Section 603	Direct Navy Payment of SFRA's Obligations	21
<u>ARTICLE VII</u>	<u>GENERAL PROVISIONS</u>	21
Section 701	Term of Agreement	21
Section 702	Amendment of Agreement	21
Section 703	Successors and Assigns	21
Section 704	Entire Agreement	21
Section 705	Severability	22
Section 706	Waiver of Breach	22
Section 707	Notices	22
Section 708	Conflict of Interest	23

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

Section 709	Access to and Retention of Records	23
Section 710	Change of Circumstances	22
Section 711	Liability and Indemnity	23
Section 712	Liability and Insurance	25
Section 713	Reports	26
Section 714	Officials Not to Benefit	27
Section 715	Representations	27
Section 716	Excess Funds	27
Section 717	Conveyance of IR Sites 7/18	28
<u>ARTICLE VIII</u>	<u>APPLICABLE LAWS AND REGULATIONS</u>	28
Section 801	Applicable Law	28
Section 802	Governing Regulations	28
Section 803	Environmental Protection	28
<u>ARTICLE IX</u>	<u>PROCUREMENT</u>	29
Section 901	SFRA Contracts	29
Section 902	Preference for Local Residents	29
<u>ARTICLE X</u>	<u>TERMINATION ENFORCEMENT, CLAIM AND DISPUTE RESOLUTION</u>	30
Section 1001	Dispute Resolution	30
Section 1002	Enforcement	31
Section 1003	Termination	31
Section 1004	Effects of Suspension and Termination	32
<u>ARTICLE XI</u>	<u>LEGAL AUTHORITY</u>	33
Section 1101	Legal Authority	33
None	<u>SIGNATURE AND WITNESS</u>	33

APPENDICES

Appendix 1	Map of the Hunters Point Naval Shipyard
Appendix 2	Map of the ACES
Appendix 3	Known Conditions
Appendix 4	Environmental Insurance Policies
Appendix 5	IR Sites 7/18 Completion Conditions
Appendix 6	SFRA Acceptance
Appendix 7	Navy IR Sites 7/18 Deed
Appendix 8	Escrow Instructions

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THE SAN FRANCISCO REDEVELOPMENT AGENCY,
SAN FRANCISCO, CALIFORNIA**

THIS EARLY TRANSFER COOPERATIVE AGREEMENT (“Agreement”) is made by and between the **UNITED STATES OF AMERICA**, acting by and through Naval Facilities Engineering Command (“Navy”) and the **SAN FRANCISCO REDEVELOPMENT AGENCY**, San Francisco, California (“SFRA”) recognized as the local redevelopment authority by the Office of Economic Adjustment ([“OEA”](#)) on behalf of the Secretary of Defense and also a local public authority legally empowered to enter into this Agreement. Hereinafter, the Navy and the SFRA are each sometimes referred to individually as a “Party” and collectively as the “Parties.”

GENERAL PROVISIONS

The Federal Government, for and on behalf of the citizens of the United States of America, acts as the steward of certain real property on which it operates and maintains military facilities necessary for the defense of the United States of America. Certain military facilities are no longer required for that mission, and, in accordance with various base closure statutory authorities, the Department of Defense (“DOD”) closed and plans to dispose of real and personal property at those facilities. The Navy is authorized to dispose of real and personal property on Hunters Point Naval Shipyard ([“HPNS”](#)), to the City of San Francisco or to a local reuse organization approved by the City, in accordance with Section 2824 (a) of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101-510), as amended by Section 2834 of the National Defense Authorization Action Act for Fiscal Year 1994 (Public Law 103-160). The SFRA is a local reuse organization approved by the City of San Francisco to accept conveyance of [HPNS](#)~~Hunters Point Naval Shipyard~~ property in accordance with the authorities set out above.

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

~~To establish the terms and conditions for the conveyance of the Hunters Point Naval Shipyard by the Navy to the SFRA, the Parties did execute and enter into that certain Conveyance Agreement Between the United States of America, Acting by and through the Secretary of the Navy, and the San Francisco Redevelopment Agency for the Conveyance of Hunters Point Naval Shipyard, dated March 31, 2004 ("Conveyance Agreement").~~

Under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. Section 9620(h)(3)(C), ~~Federal~~^{federal} property may be transferred prior to the completion of all remedial action necessary to protect human health and the environment. Under this early transfer authority, the Navy intends to convey title to the portion of ~~HPNS~~^{Hunters Point Naval Shipyard} property known as the Area Covered by Environmental Services (hereinafter "ACES"), to the SFRA. The ACES is defined in Section 222 below and shown in Appendix 2. The SFRA assumes responsibility for certain environmental response activities (hereinafter the "Environmental Services," as defined in Section 211 below) ~~for the consideration set forth in this Agreement.~~ The principal purpose of this Agreement is to facilitate early transfer and redevelopment by providing the contractual vehicle under which the SFRA will perform the Environmental Services in the ACES and be compensated for such performance.

It is in the public interest and will be beneficial to the Navy and the SFRA for the SFRA to cause to be performed the Environmental Services at the ACES. As set forth in the Amended Federal Facilities Agreement ("FFA"), as defined in Section 231 below, the Navy will resume CERCLA responsibility for compliance with the 1990 FFA in the event of a Finding of Default as provided in the Administrative Order on Consent ("AOC") as hereinafter defined. This Agreement does not supersede the Navy's obligations under CERCLA in the event the SFRA fails to comply with the terms and conditions of this agreement and the Administrative Order on Consent, as hereinafter defined. As set forth in the Amended Federal Facilities Agreement (as defined in Section 231 below), ultimate responsibility for compliance with CERCLA in the ACES remains with the Navy. These responsibilities as between the parties are set forth below in Section 711 of this Agreement.

This Agreement benefits the Navy and the SFRA because it facilitates early transfer and immediate reuse by allowing the SFRA to cause to be performed certain environmental remediation activities and simultaneously facilitates redevelopment as defined herein. This Agreement, executed as part of an early transfer, facilitates SFRA access and control to the ACES in conjunction with implementation of the SFRA's Reuse Plan (as defined in Section 220 below). In addition, early transfer will allow the Navy to convey title in compliance with CERCLA requirements at an earlier date than could otherwise be achieved. This Agreement is a Cooperative Agreement within the meaning of 31 U.S.C. Section 6305 and 10 U.S.C. Section 2701(d)(1).

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

1 In accordance with 42 U.S.C. 9620 (h)(3)(C)(iii), after all remedial action necessary to
2 protect human health and the environment with respect to any hazardous substances remaining
3 on the ACES on the date of transfer has been taken, the Navy will deliver to the SFRA an
4 appropriate document containing the CERCLA warranty that all necessary response action has
5 been taken.

6
7 The Navy and the SFRA have entered into this Agreement for the purpose of
8 establishing the terms and conditions necessary to obtain Regulatory Closure for the ACES and
9 ensure the execution of Long-Term Obligations associated with Regulatory Closure. The Navy
10 agrees to provide funds to the SFRA in accordance with and subject to the provisions of this
11 Agreement and to undertake and complete its obligations under Section 302 hereof. The SFRA
12 agrees to perform the Environmental Services in accordance with and subject to the provisions
13 of this Agreement.

14 15 Article I 16 SCOPE AND PURPOSE 17

18 Section 101. Performance of Environmental Services 19

20 The SFRA shall cause to be performed the Environmental Services in accordance with
21 and subject to the provisions of this Agreement. The Environmental Services, to the extent
22 required to be performed under this Agreement, with regard to the ACES, shall satisfy the
23 requirements of (i) CERCLA as provided for in the CERCLA Record of Decisions ("RODs")
24 and, the National Contingency Plan ("NCP"), ~~and the Administrative Order on Consent (as~~
25 ~~hereinafter defined)~~, (ii) applicable State and Federal laws and regulations
26 governing releases of petroleum as provided in the Petroleum Corrective Action
27 Plans ("PCAPs"), ~~CAPs~~; and (iii) ~~other applicable laws and regulations~~. The Navy shall
28 remain responsible for, ~~if any, Navy Obligations and Navy-Retained Conditions~~.

29 30 Section 102. Performance Method 31

32 The CERCLA RODs and PCAPs ~~CAPs and AOC~~ establish the process for obtaining
33 Regulatory Closure within the ACES. By the execution of this Agreement, the Navy concurs
34 with the process set forth in the CERCLA RODs and PCAPs ~~CAPs and AOC~~, and all
35 documents and approvals referenced therein. In the event that an Environmental Regulatory
36 Agency requires changes to the Environmental Services necessary to satisfy the CERCLA
37 RODs and PCAPs ~~CAPs and AOC~~, the SFRA shall conduct and bear ~~parties will amend this~~
38 ~~Agreement to the cost of such services~~ extent necessary to address any additional costs resulting
39 therefrom.

40 41 Article II 42 DEFINITIONS

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

Section 201. Agreement

The term “Agreement” means this Early Transfer Cooperative Agreement.

Section 202. Navy’s Representative

The Navy’s representative for execution purposes is Naval Facilities Engineering Command, which is responsible to the office of the Secretary of the Navy for environmental remediation within the ACES, or its successor.

Section 203. SFRA

The term “SFRA” means the San Francisco Redevelopment Agency, a Redevelopment Authority of the State of California, recognized as the local redevelopment authority for the ~~HPNS~~Hunters Point Naval Shipyard by the ~~OEA~~Office of Economic Adjustment on behalf of the Secretary of Defense. The SFRA is an entity that is within the meaning of the term “local government agency” as such term is used in 10 USC Section 2701(d)(1), with which the Navy is entitled to enter into “agreements on a reimbursable or other basis.”

Section 204. Hunters Point Naval Shipyard

The term “Hunters Point Naval Shipyard” ~~or “HPNS”~~ means the entirety of the real property at the former Hunters Point Naval Shipyard, shown on the map attached as Appendix 1 and incorporated herein by reference.

Section 205. Administrative Order on Consent (“AOC”)

~~—The term “Administrative Order on Consent” or “AOC” means that certain signed agreement executed between the SFRA and the Environmental Regulatory Agencies.~~

Section 206. Navy-Retained Conditions

The term “Navy-Retained Conditions” means any condition associated with Unexploded Ordnance; Military Munitions; chemical, radiological or biological warfare agents; ~~and Radiological Materials; and Unknown Uninsured Conditions.~~ The term shall also include the performance of CERCLA five-year reviews for ~~year 2013 and year 2018 only, for~~ remedies selected in a ROD issued by the Navy, and the performance of all activities necessary to achieve Regulatory Closure at IR7/18 and Building 140 [describe relevant portion], and any other activity identified as the responsibility of the Navy in the amended FFA (as defined in Section 231 below).

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

Section 207. CERCLA RODs

The term “CERCLA RODs” means the CERCLA Record of Decision for Parcel B dated _____ and the CERCLA Record of Decision for Parcel G dated _____.

Section 208. Regulatory Closure

The term “Regulatory Closure” means approval or certification of completion of any necessary remedial or corrective action required by the CERCLA RODs, the PCAPs or issuance of a “No Further Action” letter or equivalent finding by the appropriate Environmental Regulatory Agency or Agencies pursuant to the statutes and regulations administered by those Agencies with respect to the ACES and undertaken by the SFRA pursuant to this Agreement.

Section 209. Navy and Government

The terms “Navy” and “Government” are used interchangeably herein.

Section 210. Long-Term Obligations

The term “Long-Term Obligations” means any long-term review, monitoring, reporting and institutional control (“IC”) and operation and maintenance requirements that are required in support as a condition of Regulatory Closure and associated with or in furtherance of the CERCLA RODs and PCAPs, including providing support for the Navy’s preparation of the CERCLA five-year reviews in 2013 and 2018 and SFRA preparation of the CERCLA five-year reviews thereafter following Regulatory Closure.

Section 211. Environmental Services

The term “Environmental Services” means activities with respect to Known Conditions and Unknown Insured Conditions necessary to obtain Regulatory Closure, and to provide for the performance of associated Long-Term Obligations, except for the performance of CERCLA five year reviews of remedies selected in a ROD issued by the Navy. Environmental Services does not include the performance of Ineligible Work as defined in Section 218 below.

Section 212. Known Conditions

The term “Known Conditions” means those environmental conditions set forth in Appendix 3 to this Agreement and includes “Reasonably Expected Environmental Conditions” as defined in Section 221 below herein. The term “Known Conditions” does not include “Navy-Retained Conditions” or “Navy Obligations” as defined above and in Section 206302.

Section 213. Unknown Insured Conditions

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

The term “Unknown Insured Conditions” means those environmental conditions in the ACES that are not Known Conditions and for which, and to the extent, the SFRA is insured and paid pursuant to the Environmental Insurance Policies. This term also includes a specific Unknown Condition that otherwise would have been an Unknown Insured Condition but coverage was denied by the insurance provider solely due to the failure of the SFRA or named insured to comply with any Environmental Insurance requirements as set forth in the Environmental Insurance Policies, ~~except to the extent that such failure arises from a false application for insurance attributable to the Navy’s failure to disclose material information to the SFRA.~~ Excluded Unknown Insured Conditions shall be limited to the specific costs which would have been funded by the Environmental Insurance Policies but for such failure of the SFRA or the named insured.

Section 214. ~~Reserved.~~ Unknown Uninsured Conditions

~~_____The term “Unknown Uninsured Conditions” means those environmental conditions in the ACES that are not Known Conditions and are not Unknown Insured Conditions. This term does not include any Unknowns for which the SFRA or named insured is not paid by the Environmental Insurance because of any dishonest, fraudulent, specifically intentional or malicious act by the SFRA or those of a knowingly wrongful nature, or the intentional, willful or deliberate non-compliance with any statute, regulation, ordinance, administrative complaint, notice of violation, notice letter, executive order, or instruction of any government agency or body by or at the direction of an insured party [note will not Navy be an additional insured?].~~

Section 215. Radiological Materials

The term “Radiological Materials” means solid, liquid, or gaseous material derived from U.S. Government activities, that contains radionuclides regulated by the Atomic Energy Act of 1954, as amended, and those materials containing radionuclides defined as being derived from the Navy’s work on the following: nuclear propulsion plants for ships and submarines; nuclear devices and nuclear components thereof, and; radiographic and instrument calibration sources and various instrumentation and radioluminescent products manufactured for military applications. The term “Radiological Materials” does not include products manufactured for non-military applications such as radioluminescent signs, tungsten welding electrodes, and household smoke detector components.

Section 216. Environmental Insurance Policies

The term “Environmental Insurance Policies” means the environmental insurance policy(ies) issued and approved pursuant to Section XXXXX and meeting the requirements of Section XXXXX below and attached as Appendix 4.

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

Section 217. Reserved

Section 218. Ineligible Work

The term “Ineligible Work” means the performance of any or more of the following work:

a. Cleanup of lead based paint (“LBP”) and asbestos containing materials (“ACM”) incorporated into building materials in their original location and not previously demolished by the Navy or its contractors and lead in soil resulting from natural weathering LBP from structures.

b. Cleanup of pesticides and herbicides applied in accordance with the requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) and its predecessors including, but not limited to, chlordane legally(?????) applied as a termiticide to existing wooden structures, and their foundations, and soils ~~but not existing in the soil.~~

c. Management and off-site disposal of ~~Known Conditions associated with~~ contaminated soil or solid waste excavated or generated during the course of Redevelopment Activity within any portion of the ACES for which all appropriate Environmental Regulatory Agencies have previously approved Regulatory Closure following the installation of a cap/cover remedial action by the SFRA or approved Response Action Completion Report (“RACR”) following installation of a cap/cover remedial action by the Navy.

d. Additional remediation necessary to implement a change in land use from the land uses set forth in the Reuse Plan.

e. Management and disposal of construction and demolition debris created in the course of Redevelopment Activity, ~~except to the extent that such debris includes Unknown Uninsured Conditions.~~

f. Clean up of contaminants within existing buildings and structures, that have not been released into the environment; except the following shall not be Ineligible Costs: removal of liquids, solids, gases, sediments, and/or sludges from and including oil/water separators and other equipment and containment vessels within or beneath structures to the extent the equipment and vessels ~~are~~ were not reasonably discovered ~~known~~ by visual inspection during a walk-through ~~or disclosed to the SFRA and are not insured.~~

g. ~~Cleanup of naturally occurring levels of chemicals as defined by the Environmental Regulatory Agencies and the Government that are not required to be remediated by an Environmental Regulatory Agency.~~

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

h. Non-cleanup environmental compliance activities relating to redevelopment/construction following conveyance (e.g., compliance with air quality permit requirements for control of fugitive dust emissions that are not contaminated with hazardous substances or petroleum and the National Pollutant Discharge Elimination System ["NPDES"] stormwater discharge permit requirements regulating excavation/disturbance of soil that is not contaminated with hazardous substances or petroleum).

h. Any redevelopment, reconstruction, alteration, or replacement of any initial cap/cover containment remedial action constructed pursuant to a ROD unless such cap/cover is deemed ineffective for its intended purpose by determination of a Regulatory Agency.

i. Any other work or activity that is not related to: (1) achieving "Regulatory Closure" for releases of hazardous substances or petroleum within the ACES, or (2) performing associated "Long-term Obligations."

j. ~~Reimbursement for~~ Regulatory Enforcement Activities unrelated to regulatory oversight.

k. Cleanup that is required as a result of a violation of use restrictions by the SFRA, its successors and assigns, of any land use restriction, groundwater restriction, deed covenant or institutional control applicable pursuant to the Early Transfer Property.

l. Cleanup arising from the failure of the SFRA, its successors and assigns, to operate or maintain a remedy as required by the ROD, Land Use Control Remedial Design Reports ("LUC RD"), Risk Management Plan ("RMP") and/or Operation and Maintenance Plan ("OMP"). AOC.

Section 219. Redevelopment Activity

The term Redevelopment Activity means activities undertaken after the Effective Date of this Agreement in furtherance of the development of the property, including, but not limited to, construction of roads, utilities, and structures and demolition and/or removal of "hardscape" such as roads, sidewalks, and building foundations, ~~except to the extent such activities are required to be performed by an Environmental Regulatory Agency.~~

Section 220. Reuse Plan

The term "Reuse Plan" means the Department of Housing and Urban Development- ("HUD") approved Redevelopment Plan for ~~HPNS~~ the Hunters Point Naval Shipyard, approved by the Mayor and Board of Supervisors for the City of San Francisco in July of 1997, as such Redevelopment Plan has been amended as of the date of the execution of this Agreement, all in

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

accordance with the California Community Redevelopment Law (Health and Safety Code Section 33000, et seq.).

Section 221. Reasonably Expected Environmental Conditions

The term “Reasonably Expected Environmental Conditions” means those environmental conditions that ~~can be the Parties~~ reasonably ~~expected in consideration of expect to occur, given~~ the specific sources of the Known Conditions, customary uses on the ACES associated with ~~dislosed~~ Navy operations and resulting environmental conditions. By way of example and not limitation, whether an environmental condition may be reasonably expected or not is illustrated as follows: Environmental conditions that are reasonably expected include (i) the concentration of a contaminant at a site is greater than the concentration for that respective contaminant identified at the site in Appendix 3, (ii) a contaminant at a site is, based upon the state of scientific knowledge at the time that this Agreement is executed, a scientifically-accepted “break-down” constituent of, or associated with, a contaminant identified in Appendix 3 as being present at that respective site, (iii) the physical extent of a contaminant at a site is greater than the extent of that contaminant identified in Appendix 3 as being present at that respective site, ~~and the greater extent of the contaminant is consistent with Known Conditions.~~

Section 222. Area Covered by Environmental Services

The term “Area Covered by Environmental Services” or “ACES” means that area identified on the map in Appendix 2.

Section 223. Unexploded Ordnance/Munitions or Explosives of Concern

The term “Unexploded Ordnance” or “UXO” means Military Munitions that have been fired, dropped, launched, projected, or otherwise placed, abandoned or disposed of in such manner as to constitute a hazard to military or non-military operations, installations, personnel, or material and remain unexploded either by malfunction, design, or any other cause.

Section 224. Military Munitions

The term “Military Munitions” means all ammunition products and components produced or used by or for DOD or the United States Armed Services for national defense and security, including military munitions under the control of DOD, the United States Coast Guard, the United States Department of Energy (“DOE”) and National Guard personnel. The term “Military Munitions” includes, but is not limited to, confined gaseous, liquid, and solid propellants, explosives, pyrotechnics, chemical and riot control agents, smokes, and incendiaries used by DOD components, including bulk explosives and chemical warfare agents, chemical munitions, rockets, guided and ballistic missiles, bombs, warheads, mortar rounds, artillery ammunition, small arms ammunition, grenades, mines, torpedoes, depth charges,

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

cluster munitions and dispensers, demolition charges, and devices and components thereof. The term “Military Munitions” does not include wholly inert items and non-standard explosive devices made from either military or non-military materials by personnel unrelated to DOD. However, the term “Military Munitions” does include non-nuclear components of nuclear devices managed under DOE’s nuclear weapons program after all required sanitization operations under the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§2011 et seq., have been completed.

Section 225. Navy Obligations

The term “Navy Obligations” means the obligations of the Navy as set forth in Section 302 hereof.

Section 226. Regulatory Oversight

The term “Regulatory Oversight” includes the following services provided by the United States Environmental Protection Agency (“USEPA”), DTSC, the California Department of Toxic Substances Control (“DTSC”), the San Francisco Bay Water Quality Control Board (“Water Board”) or the California Department of Public Health (“CDPH”), and, San Francisco Department of Public Health or other regulatory agency which are considered an allowable costs under this Agreement ~~include but are not limited to:~~

- a. Technical review of documents or data;
- b. Identification and explanation of state applicable or relevant and appropriate requirements (ARARs);
- c. Site visits other than enforcement inspections ~~in response to Regulatory Enforcement Activities;~~
- d. Technical Review Committee (TRC) or Restoration Advisory Board (RAB) participation;
- e. Administration of the Cooperative Agreement Technical review and comment on all documents and data regarding DoD prioritization of sites;
- f. Determination of scope and applicability of agreements, excluding any litigation costs against the U.S. Government;
- g. Independent quality assurance/quality control samples.

Section 227. Regulatory Enforcement Activities

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

1
2 In accordance with 10 U.S.C. 2701(d)(3), regulatory enforcement costs are not
3 ~~allowable costs~~reimbursable under this Agreement. The term “Regulatory Enforcement
4 Activities” includes:

5
6 a. Activities associated with the City taking, or preparing to take, enforcement
7 actions against third parties for alleged violations of laws, regulations, or enforceable
8 agreements associated with environmental protection, public health or safety or alleged
9 violations of land use restrictions set forth in quitclaim deed(s) or in covenants restricting the
10 use~~Covenants to Restrict Use~~ of the land~~Land~~ on the ACES; or

11
12 b. Activities associated with USEPA, DTSC, the Water Board, DPH~~California~~
13 ~~Department of Public Health~~, or other State or Federal regulatory agency taking, or preparing to
14 take, enforcement actions against the City, or its contractors or agents, for alleged violations of
15 laws, regulations, or enforceable agreements associated with environmental protection, public
16 health or safety.

17 18 **Section 228.** Grants Officer

19
20 The Navy’s Grants Officer is the Director of Acquisition, NAVFACENGCOM, and is
21 the only authorized Government official who can make changes and obligate funds under this
22 Agreement.

23 24 **Section 229.** Environmental Regulatory Agency or Agencies

25
26 The term “Environmental Regulatory Agency or Agencies” means the United States
27 Environmental Protection Agency (“USEPA”), the California Department of Toxic Substances
28 Control (hereinafter “DTSC”), the San Francisco Bay Water Quality Control Board, and
29 “Regional Water Board”), the CDPH~~California Department of Public Health or other~~
30 appropriate regulatory agency.

31 32 **Section 230.** Covenant to Restrict the Use of Property.

33
34 The term “Covenant to Restrict the Use of Property” or “CRUP” means that certain
35 document required by the RODs that identifies the environmental covenants and restrictions
36 that shall apply to the ACES ~~as a result of the Known Conditions on the ACES, which are~~
37 addressed under the AOC. These environmental covenants and restrictions are necessary for
38 the protection of human health and the environment and the implementation of final remedies
39 for the ACES.

40 41 **Section 231.** Amended Federal Facilities Agreement.

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

The term “Amended Federal Facilities Agreement” or “Amended FFA” means that certain document executed by the Navy, USEPA, DTSC, and the ~~Regional~~ Water Board dated _____, whereby the ~~Parties~~~~parties~~ amended the ~~FFA~~~~Federal Facilities Agreement~~ executed on _____.

Article III OBLIGATIONS OF THE PARTIES

Section 301. Obligations of the SFRA

a. In consideration of the Navy’s agreement to pay the SFRA ~~for allowable costs~~ in the amount specified in Section 302.~~a~~-below, ~~and in accordance with terms of this Agreement, the provisions of Title 32 of the Code of Federal Regulations (“CFRs”) and the applicable Office of Management and Budget (“OMB”) Circulars,~~ for performing the Environmental Services, the SFRA assumes responsibility for the Environmental Services to address Known Conditions, Reasonably ~~Expected~~~~Anticipated~~ Environmental Conditions, and Unknown Insured Conditions ~~in accordance with, and subject to, the terms of this Agreement.~~ Subject to the provisions of Sections 302.~~a~~-hereof, the SFRA agrees that it shall cause to be performed the necessary Environmental Services even if the costs associated therewith exceed the funds provided by the Navy hereunder. The SFRA’s obligation to perform Environmental Services is expressly conditioned upon the Navy providing funding for performing the Environmental Services in accordance with Section 302.~~a~~-hereof. However, to the extent that the Navy pays a portion of the funding set forth in Section 302.~~a~~-hereof, but fails to pay the full amount set forth in that Section, or in the event that the Agreement terminates pursuant to Section 1003 hereof, the SFRA’s obligations shall be limited to only that portion of Environmental Services which have been performed by use of the funds actually provided by the Navy or the insurer as set forth in Section 712.B hereof. These conditions shall be subject to dispute resolution pursuant to Section 1001 hereof. The SFRA shall make reasonable progress toward performing Environmental Services. The SFRA shall conduct audits and shall provide performance and financial reports to the Navy in accordance with Section 301.c. below. The SFRA shall cause the performance of the Environmental Services in a manner that will not unreasonably delay the Navy's performance of its obligations under Section 302 hereof.

b. The SFRA shall indemnify the Navy pursuant to the terms of Section 711.C hereof.

c. Non-Federal Audits, Performance Reporting & Financial Reports.

(1) The SFRA is responsible for obtaining annual audits in accordance with the Single Audit Act Amendments of 1996 (31 USC 7501-7507) and revised OMB Circular A-133, “Audits of States, Local Governments, and Non-Profit Organizations.” The audits shall be made by an independent auditor in accordance with generally accepted government auditing

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

standards covering financial audits. The costs of audits made in accordance with this section are allowable ~~costs under charges to~~ this Agreement.

(2) The SFRA is responsible for assuring compliance with applicable Federal requirements and that performance goals are being achieved. In accordance with 32 CFR 33.40, the SFRA shall submit annual performance reports to the Navy.

(3) In accordance with 32 CFR 33.41, the SFRA shall submit annual financial status reports to the Navy.

d. The SFRA shall provide the Navy notice within thirty (30) calendar days of receiving notice by Environmental Regulatory Agencies, or other third parties, of the existence of any condition at the ACES that suggests that an action is necessary for which the SFRA is not responsible under this Agreement. If the SFRA is served with a complaint or written notice by an Environmental Regulatory Agency, the SFRA shall provide the Navy with a copy of such document no later than seven (7) calendar days following the service of such document.

e. Within thirty (30) calendar days of receiving actual notice of any condition at or affecting the ACES or that the SFRA discovers, for which the SFRA is not responsible under Section 302 hereof, the SFRA shall notify the Navy of such condition. The exception to this duty is that the SFRA shall notify the Navy of the discovery of any UXO, biological warfare agents, or radiological or chemical warfare agents within twenty-four (24) hours of any such discovery. The ~~Parties~~ shall, within a reasonable period of time ~~five (5) business~~ days after such notification, meet and confer regarding the terms on which the Navy may return to conduct any additional remedial action found to be necessary or provide funds to the SFRA in amounts sufficient to take any necessary actions required by CERCLA.

f. Notwithstanding the provisions of the preceding Section 301.e. hereof, but subject to the Navy's funding limitation as set forth in Section 401 hereof, the SFRA shall have the right, but not the duty, to take or cause to be taken the following actions within the ACES with respect to Navy-Retained Conditions:

(1) Investigation Activities. Any activity necessary to determine the existence, nature, character and extent of conditions that may constitute Navy-Retained Conditions.

(2) The SFRA shall notify the Navy within fifteen (15) business days whenever the SFRA takes or causes to be taken any action under Section 301.f.(1) hereof. If the Navy disputes an SFRA action taken under Section 301.f.(1), the Navy may initiate dispute resolution procedures under Section 1001 hereof.

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

g. If the SFRA discovers a condition in the ACES that the SFRA reasonably believes is a Navy-Retained Condition, the SFRA shall seek to determine whether such condition is in fact a Navy-Retained Condition before incurring such costs or obligations. If, despite using its best efforts to avoid incurring such costs, the SFRA incurs costs or obligations with respect to a Navy-Retained Condition, the SFRA may seek reimbursement from the Navy, subject to the Navy's funding limitation as set forth in Section 401, hereof, and the dispute resolution provisions of Section 1001 hereof. Nothing in this Agreement shall be construed as authorizing the SFRA to seek reimbursement from the Navy for costs solely associated with the initial investigation needed to determine whether a newly discovered condition is properly categorized as a Known Condition, an Unknown ~~Insured~~ Condition, or ~~Navy-Retained Condition. Subject to Section 401, hereof, and the dispute resolution process as set forth in Section 1001, if said condition is determined to be in fact a Navy-Retained Condition, the SFRA's reasonable investigation costs shall be reimbursed, subject to the availability of funds~~

h. The SFRA shall provide to the Navy all information obtained or developed by the SFRA with respect to any Navy-Retained Conditions that the SFRA discovers.

i. The SFRA shall obtain the Environmental Insurance Policies, and other insurance required, as described in Section 712, herein.

j. The SFRA shall conduct annual site inspections to ensure that all institutional control objectives and land use restrictions are complied with by all future transferees of the ACES and prepare compliance monitoring reports and certificates as provided in the LUC RD required by the RODs. The SFRA shall notify and obtain approval from the Navy of any proposals for a change in land use that is inconsistent with the use restrictions and assumptions described in the RODs. The SFRA shall notify and obtain approval from the FFA Signatories after receiving approval from the Navy.

Section 302. Obligations of the Navy

a. The maximum funding obligation of the Navy to the SFRA for performing the Environmental Services during the term of this Agreement is \$____[TBD X]_____ for the SFRA to perform that portion of the Environmental Services relating to Parcel G, and \$____[TBD Y]_____ for the SFRA to perform the remaining balance of the Environmental Services, for a total of \$____[TBD Z]_____ for all of the Environmental Services, and shall be provided to the SFRA in (?) advance payments. The first payment to the SFRA shall be made ~~withinto the escrow agent, as hereinafter defined~~ ~~TBD X~~ (X) days after ~~approval of the early transfer by the Administrator of EPA and concurrence by the Governor of California, with instructions to such Escrow Agent to transfer all funds then in escrow to the SFRA upon~~ recordation of the deed conveying title to the Early Transfer Property from the Navy to the City SFRA. ~~[Subsequent payments shall be made on ...].~~ The Navy's obligation to pay hereunder is subject to the availability of appropriated funds and this payment schedule shall

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

not be interpreted to require obligations or payments by the Navy in violation of the Anti-Deficiency Act (31 U.S.C. 1341).

b. Within a reasonable time after the SFRA has provided the Navy with:

(1) the proper documentation establishing that Regulatory Closure has been obtained for the ACES,

(2) documentation of approval of "operating properly and successfully" demonstration as approved by the Administrator of EPA if necessary in accordance with 120(h)(3)(B), and

(3) a written request from the SFRA to issue the appropriate CERCLA warranty, the Navy shall issue to the SFRA the warranty required under CERCLA, Section 120(h)(3)(C)(iii). The SFRA shall bear the costs of preparing any new legal descriptions for the CERCLA warranty to be recorded.

c. Within a reasonable period of time~~thirty (3) calendar days~~ after receiving any notice from the SFRA under Section 301.d. or 301.e. hereof, the Navy shall confer with the SFRA with regard to ~~any~~the Navy-Retained Condition~~Conditions~~ at issue. The exception to these terms is that the Navy shall confer with the SFRA within a reasonable period of time~~five (5) business days~~ after receiving any notice concerning the presence of UXO, biological warfare agents, chemical warfare agents or Radiological Materials. The Navy and the SFRA, in consultation with the appropriate Environmental Regulatory Agency or Agencies, shall endeavor to agree to any necessary actions to be taken by the Navy with respect to ~~the~~Navy-Retained Conditions, subject to the availability of funds. Alternatively, the Parties shall attempt to agree on the funds to be provided by the Navy to the SFRA to enable the SFRA to take such actions as may be required by appropriate Environmental Regulatory Agencies, subject to the availability of funds. If the Parties cannot agree whether an environmental condition constitutes a Navy-Retained Condition, or disagree about the action required in response to any such condition under CERCLA, the matter may be submitted to dispute resolution under Section 1001. Consistent with the provisions of above Section 301.f., the SFRA may take any actions deemed necessary, and seek reimbursement from the Navy for the costs associated with such actions.

d. Any Navy liability for the death of or injury to any person, or the loss of or damage to any property, caused by Navy use of the ACES shall be determined in accordance with the applicable provisions of the Federal Tort Claims Act (28 U.S.C. Section 2671, et seq., as amended), or as otherwise provided by law.

Commented [r1]: The issue of advance payment(s) and whether or not an escrow account will be established needs to be determined and discussed.

Commented [r2]: Additionally, depending on the status of the environmental insurance policies, to be discussed, a paragraph that states "Notwithstanding the provisions of Section 302.a. above, prior to payment being made by the Navy to the SFRA, the Environmental Insurance Policies as required by Section 712.B below, must be issued and the terms, conditions and insurer as set forth in and identified by the Environmental Insurance Policies must be reviewed and approved, which approval shall not be unreasonably withheld, by the Navy and the SFRA" may need to be inserted here.

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

Article IV FUNDING LIMITATION AND BUDGETING

Section 401. Navy's Funding Limitation

The maximum Navy funding obligation for the Environmental Services to be performed by the SFRA under this Agreement is \$[TBD X]. Except as may otherwise be provided in Section 302.c. above, the Navy will not pay any Environmental Service costs that exceed the amount described in Section 302.a. above. The Navy's obligation to pay any costs hereunder is subject to the availability of appropriated funds. Nothing in this ~~Agreement~~ shall be interpreted to establish obligations or require payments by the Navy in violation of the Anti-Deficiency Act, 31 U.S.C. §§ 1341 et seq. The SFRA incurs any additional costs, including any costs for services or activities determined to be defined as Ineligible Work, at its own risk. Any statements in this Agreement regarding the SFRA's ability to seek reimbursement for any additional costs, or to negotiate any additional amounts to be paid, do not create a Navy obligation to pay such costs or amounts.

INSERT THE UIC AND LINE OF ACCOUNTING HERE

Article V PAYMENT SCHEDULE

Section 501. General

The SFRA shall be paid in accordance with Section 302.a. above.

Section 502. Payments

a. The amount provided by the Navy in accordance with Section 302.a. is an advance payment to the SFRA made in accordance with the advance payment requirements of 32 CFR §33.21(c), as follows:

(1) The SFRA shall maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of the funds and their disbursement by the SFRA.

(2) Within ten (10) business days after receiving the payment from the Navy, the SFRA shall deposit all such funds with an independent third party payee such as an escrow agent, title company, or insurer. Such independent third party payee shall be responsible for making all payments to the party or parties, including a subsequent transferee and/or environmental contractor, with whom the SFRA enters into an agreement to supervise

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

the performance of the Environmental Services. Funds shall be considered disbursed by the SFRA when the following has occurred:

(A). The SFRA does not retain possession of the funds;

(B). The SFRA cannot get the funds back upon demand (this does not include allowable costs incurred by the SFRA for which the SFRA requests proper reimbursement from the independent third party payee);

(C). The independent third party payee is an independent stakeholder for the SFRA and the party or parties with whom the SFRA enters into an agreement to supervise the performance of the Environmental Services and not the agent of the SFRA;

(D). The SFRA receives something in exchange for the transfer of funds to the independent third party payee, such as a contractual promise to hold the funds and make payments in accordance with specified procedures.

(3) Any agreement by the SFRA with an independent third party payee must also include the above provisions (A). through (D). and satisfy the requirements of 32 CFR §33.21(c).

(4) Interest. Any interest earned on the advance payment by the SFRA prior to the disbursement of those funds to an independent third party payee, as set forth in accordance with Section 502.a. above, must be returned to the Navy in accordance with 32 CFR §33.21(h)(2)(i) or otherwise credited to the Navy for the purposes of this Agreement. However, any interest earned on those funds after disbursement from the SFRA to the independent third party payee are considered funds to be utilized for the purposes of this Agreement.

Article VI PAYMENT

Section 601. General

~~After~~Within X (X) days after recordation of the deed conveying title to the ACES Property from the Navy to the SFRA, the Navy shall make the first payment to the SFRA [and subsequent payments within] as provided in this Agreement and in compliance with the provisions of 32 CFR Part 33, OMB Circular A-87 and OMB Circular A-102. [see escrow provision in 302.a.]

Section 602. Relation to Prompt Payment Act.

This Agreement is not a contract as defined under OMB Circular A-125, which implements the Prompt Payment Act of 1982 (31 U.S.C. Section 3901, et seq.). Accordingly,

Commented [r3]: Note that if an escrow account is determined to be established then the following language will need to be included in the Agreement "Any interest earned on the advance payment while in the escrow account pending transfer to the SFRA must be returned to the Navy in accordance with 32 CFR §33.21(h)(2)(i)".

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

the Navy is not liable to the SFRA for interest on any untimely payments under this Agreement.

Section 603. Direct Navy Payment of SFRA Obligations

The Navy is not in privity with, and shall not directly pay any SFRA contractors, employees, vendors, or creditors for any costs incurred by the SFRA under this Agreement. The Navy assumes no liability for any of the SFRA's contractual obligations that may result from any SFRA performance of duties under this Agreement. The Navy assumes no liability hereunder for any SFRA contractual obligations to any third parties for any reason. The SFRA hereby agrees to defend and hold the Navy harmless from any such liabilities.

Article VII GENERAL PROVISIONS

Section 701. Term of Agreement

Unless terminated under Section 1003 below, this Agreement shall remain in effect until Regulatory Closure within the ACES has been obtained. Only the following three terms of this Agreement shall survive such termination, and then only if the Agreement is not terminated as a result of the Navy's failure to provide the funds specified in Sections 302.A and 302.B above or other Navy default:

a. SFRA requirements to maintain compliance under the CERCLA RODs and CAPs, and to comply with any applicable Long-Term Obligations;

b. the SFRA's and the Navy's obligations under Section 711 below (including the relevant provisions of Sections 101, 102, 301.A, 302, 703, 706, 707, and 801 cross-referenced in Section 711), and; (iii) Section 715.

Section 702. Amendment of Agreement

Only a written instrument signed by the parties hereto may amend this Agreement.

Section 703. Successors and Assigns

All obligations and covenants made by the parties under this Agreement will bind and inure to the benefit of any successors and assigns of the respective parties, whether or not expressly assumed by such successors or assigns, and may not be assigned in whole or in part without the written consent of the other party.

Section 704. Entire Agreement

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

This Agreement constitutes the entire Agreement between the parties. All prior discussions and understandings on this matter are superseded by this Agreement.

Section 705. Severability

If any provision of this Agreement is held invalid, the remainder of the Agreement will continue in force and effect to the extent not inconsistent with such holding.

Section 706. Waiver of Breach

No Party shall be deemed to have waived any material provision of this Agreement upon any event of breach by the other party, and no "course of conduct" shall be considered to be such a waiver, absent the waiver being documented in a mutually signed writing.

Section 707. Notices

Any notice, transmittal, approval, or other official communication made under this Agreement will be in writing and will be delivered by hand, facsimile transmission, electronic mail, or by mail to the other party at the address or facsimile transmission telephone number set forth below, or at such other address as may be later designated:

With Regard to the Navy:

Director, Base Realignment and Closure Management Office
Department of the Navy
1455 Frazee Road, Suite 900
San Diego, CA 92108

With a copy to:

With Regard to the SFRA:

With a copy to:

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

Section 708. Conflict of Interest

The SFRA shall ensure that its employees are prohibited from using their positions for a purpose that is, or gives the appearance of being, motivated by a desire for private gain for themselves or others.

Section 709. Access to and Retention of Records

The SFRA shall afford any authorized representative of the Navy, DOD, the Comptroller General, or other ~~Federal~~^{federal} Government agency access and the right to examine all SFRA records, books, papers, and documents related to the SFRA's performance under this Agreement. This includes all records in automated forms ("Records") that are within the SFRA's custody or control, and that relate to its performance under this Agreement. This right of access excludes any attorney-client communications, attorney work product, or any other legally privileged documents. The SFRA shall retain required records intact in their original form, if not the original documents, or in another form if the Navy approves. Such approval shall not be unreasonably withheld. SFRA record retention requirements shall extend for at least three (3) years following the completion or the termination of this Agreement. The SFRA shall allow the Navy access to the SFRA's records during normal business hours. The Navy will give the SFRA seventy-two (72) hours prior notice of its intention to examine the SFRA's records, unless the Navy determines that more immediate entry is required by special circumstances. Any such entry shall not give rise to any claim or cause of action against the Navy by the SFRA or any officer, agent, employee, or contractor thereof.

~~Note: During AOC discussions, EPA expressed a preference for the Navy to maintain the administrative record, even though EPA will become the lead agency for post-ROD decisions. This is best addressed in the Amended FFA, not the ETCA.~~

Section 710. Change of Circumstances

Each ~~Party~~^{party} will promptly notify the other ~~Party~~^{party} of any legal impediment, change of circumstances, pending litigation, or any other event or condition that may adversely affect such ~~Party's~~^{party's} ability to perform this Agreement.

Section 711. Liability and Indemnity, Waiver and Release

a. The SFRA's Obligations and Limited Waiver of Statutory Rights

(1) In consideration of the Navy's payment to the SFRA under Section 302 above, and the other applicable terms of this Agreement, the SFRA agrees that it shall, upon receipt of the first payment of the grant award, indemnify and hold the Navy harmless for any of the following:

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

(A) any response cost claims for Known and Reasonably Expected Environmental Conditions in the ACES, including hazardous substances, pollutants and contaminants, petroleum, and petroleum derivatives, but only to the extent that such response cost claims result from and are associated with Known Conditions; Reasonably Expected Environmental Conditions; or activities, actions, contaminants and wastes set forth above in the list of "Ineligible Work" as set forth in Section 218 above. The SFRA's indemnification obligation under this subparagraph (1)(a) shall not apply to Navy--Retained Conditions and ~~Uninsured~~ Unknown Conditions which are not subject to the environmental insurance policy or policies;

(B) oversight costs for any remedy implemented by the SFRA to the extent that the SFRA is required to install such remedy to achieve Regulatory Closure under this Agreement;

(C) all claims for personal injury or property damage to the extent caused by the SFRA or its contractors in the course of performing the Environmental Services;

(D) all natural resource damage claims pursuant to 42 U.S.C. Section 9607(a)(4)(C) pertaining to releases of hazardous substances, but only to the extent that such damages were caused, or contributed to, by the ~~negligent or wrongful~~ actions of the SFRA, its contractors or its successors in interest;

(E) all costs arising from any faulty performance of the Environmental Services;

(F) all costs of additional remediation required on or within the ACES as a result of a change in land use from that upon which the initial remedial action selection decision was based when Regulatory Closure was completed;

(G) all costs associated with the correction of any failure of any Navy-selected remedy implemented by the SFRA, but only to the extent such costs are directly attributable to the poor workmanship or negligence of the SFRA or its contractors in the performance of said implementation;

(H) all costs arising from the correction of any failure of any remedy selected and implemented by the SFRA; and

(I) all costs arising from or associated with claims addressed in the Waiver, Release and Covenant Not to Sue provisions set forth in Section 711.A(7) below.

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

(2) With regard to the ACES, the Parties agree that the SFRA has provided financial assurances reasonably acceptable by the Navy to meet the requirements of 42 U.S.C. Section 9620(h)(3)(C)(ii).

(3) Except as otherwise expressly provided by this Agreement, this Agreement shall not be construed to limit, expand or otherwise affect any right that the SFRA may have, in the absence of this Agreement, to take legal action to require the Navy to act with respect to Navy-~~Retained Conditions-Obligations~~, or to seek damages resulting from the Navy's performance or failure to perform any actions with respect to Navy-~~Retained Conditions-Obligations~~. Except as otherwise expressly provided by this Agreement, this Agreement shall also not be construed to limit, expand or otherwise affect any right that the Navy may have, in the absence of this Agreement, to take legal action against the SFRA.

(4) Nothing in this Section creates rights of any kind in any person or entity other than the Navy and the SFRA.

(5) The provisions of this Section shall be included in any deed or lease from the SFRA of all or any portion of the subject Property and shall be binding upon any successor in interest.

(6) The SFRA and the Navy agree that the Environmental Services to be caused to be performed by the SFRA in accordance with the terms of this Agreement does not include any work relating to nor is the SFRA responsible for indemnification of the Navy for any work related to Navy-~~Retained Conditions~~.

(7) Waivers, Releases, and Covenants Not to Sue. In consideration of the Navy's payment to the SFRA under Section 302 above, and the other applicable terms of this Agreement, and as an administrative settlement of past, present, and future claims or causes of action ("claims"), the SFRA, upon receipt of payment, waives, releases, and covenants not to sue or otherwise pursue any cost, claim or liability against the Government relating to:

(A) Any cleanup, response or corrective action, property damage, or personal injury incurred by the SFRA associated with or as a result of Known Conditions; Reasonably Expected Environmental Conditions; Insured Unknown Conditions; or activities, actions, contaminants and wastes set forth above in the list of "Ineligible Work;" and

(B) Any consequential damages related to development delays caused by the Navy's performance of, or failure to perform, investigation or remediation activities with respect to Navy-~~Retained Conditions-Obligations~~; and

(C) Any cost of redeveloping, reconstructing, altering, repairing, or replacing any cap/cover or containment remedial action constructed pursuant to a CERCLA

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

1 ROD, whether or not such activity is addressed in subsequent CERCLA RODs or PCAPs, a
2 CERCLA ROD Amendment, an Explanation of Significant Differences (“ESD”), or through a
3 review and approval process by the United States of America and/or State of California
4 pursuant to a RMP Risk Management Plan or CERCLA IC review and approval procedure,
5 ~~except costs resulting from the failure of such remedy not attributable to any act or omission by~~
6 ~~the SFRA.~~

7 8 **Section 712. Liability and Insurance**

9
10 a. The SFRA shall either self-insure, or carry and maintain general liability
11 insurance, to afford protection with limits of liability in amounts not less than \$5,000,000.00 in
12 the event of bodily injury or death to any number of persons in any one accident.

13
14 b. The SFRA agrees to bind subsequent to the execution of this Agreement
15 Environmental Insurance Policies with reasonably acceptable terms, conditions and coverages
16 to the Navy which shall that include both a Cleanup Cost Cap Policy (“Cost Cap Policy”) for
17 cost overruns associated with the performance of the Environmental Services and a Pollution
18 Legal Liability Insurance Policy (“PLL Policy”), or similar coverages, which have been
19 reviewed and approved in form by the Navy and issued by an insurance carrier that is rated
20 A.M. Best’s _____ or better, as shown in Appendix 4. Such Policy or Policies will
21 provide that the insurer waive its right of subrogation against the Navy, its officers, agents, or
22 employees. In no circumstances will the SFRA be entitled to assign to any third party any
23 rights of action that the SFRA may have against the Navy under this Agreement, subject to the
24 provisions of Section 711.above. The Navy shall be listed as an Additional Insured with
25 respect to the coverage provided in any Environmental Insurance Policy or Policies. The Navy
26 shall not otherwise be deemed an insured of, nor have any rights with respect to, any other
27 grant of coverage under the Environmental Insurance Policies.

28
29 c. RESERVED for additional specific environmental insurance language to
30 be developed.

31
32 d. The SFRA will either self-insure or carry and maintain worker’s compensation
33 or similar insurance in the form and amounts required by law. If a worker’s compensation or
34 similar insurance policy is obtained, any such insurance policy will provide a waiver of
35 subrogation of any claims against the Navy, its officers, agents, or employees. In no
36 circumstances will the SFRA be entitled to assign to any third party rights of action that the
37 SFRA may have against the Navy.

38
39 ed. General Liability Policy Provisions: All general liability insurance which the
40 SFRA carries or maintains, or causes to be carried or maintained, under this Section 712 will be
41 in such form, for such amounts, for such periods of time and with such insurers as the Navy
42 may reasonably approve. Such Navy approval shall not be unreasonably withheld or delayed.

Commented [r4]: This needs to be discussed. We show the insurance attached as Appendix 4 yet there is this mention of no policy until after the execution of the ETCA. If after execution, language such as “The Environmental Insurance Policies must be issued and the terms, conditions and coverages as set forth in this section must be reviewed and agreed upon by the Parties prior to any advance payment and recordation of the deed conveying title to the Early Transfer Property from the Navy to the City” will need to be included.

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

All policies issued for general liability insurance required by this Agreement will provide that no cancellation will be effective until at least thirty (30) days after the Navy receives written notice thereof. Any such policy shall also provide a waiver of subrogation of any claims against the Navy, and its officers, agents, or employees. In no circumstances will the SFRA be entitled to assign to a third party any rights of action which the SFRA may have against the Navy. The Navy acknowledges and accepts the SFRA's self-insurance coverage for general liability, worker's compensation, or for any similar coverage.

fe. Delivery of Policies: The SFRA will provide the Navy with a certificate of insurance or statement of self insurance evidencing the insurance required for the SFRA. At least thirty (30) days before any such policy expires, the SFRA shall also deliver to the Navy a certificate of insurance evidencing each renewal policy covering the same risks.

Section 713. Reports

To assure that the Navy will receive from the SFRA the appropriate documentation necessary for the Navy to execute the CERCLA covenant, the Navy may request that the SFRA provide additional information concerning the environmental condition of the ACES. As soon as possible after any such request is made, if the SFRA can reasonably obtain and release such information, the SFRA shall provide the Navy access to any documents containing such requested information. In any event, the SFRA agrees to provide the Navy such access within ten (10 business days of the Navy's information request.

Section 714. Officials Not to Benefit

The SFRA acknowledges that no member or delegate to the United States Congress, or Resident Commissioner, shall be permitted to share in any part of this Agreement, or receive any benefit that may arise therefrom.

Section 715. Representations

a. The Navy represents that:

- (1) it is fully authorized to enter into this Agreement;
- (2) the SFRA may rely on the data provided to the SFRA or its contractors by the Navy or the Navy's contractors for purposes of performing the Environmental Services and making any disclosures required under applicable law; and
- (3) the information provided to the SFRA by the Navy hereunder fairly and accurately represents the Navy's actual knowledge of the nature and extent of contamination within the ACES.

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

b. ~~In the event that any of these representations are not accurate, SFRA shall be entitled to recover from the Navy its additional costs and expenses attributable to or arising from such inaccuracy in order to obtain regulatory closure, subject to the availability of funds.~~

c. The SFRA represents that:

(1) it is a local reuse organization approved by the City in accordance with Section 2824 (a) of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101-510), as amended, and is fully authorized to enter into this Agreement; and,

(2) it enters into this Agreement cognizant of the requirements and prohibitions set forth in the Anti-Deficiency Act (~~ADA~~), and,

(3) any provision of this Agreement that states or implies that the Navy will reimburse the SFRA for any costs incurred, or that the Navy will perform any actions with respect to Navy ~~Retained Conditions~~Obligations, are wholly subject to the Anti-Deficiency Act~~ADA~~.

Section 716. Excess Funds

Funds, as provided for in Section ~~401302 and Section 502~~ above, are only to be expended for the purposes for which they were provided for under the terms of this Agreement. In accordance with the procedures outlined in 32 CFR 33.50, ~~if any funds paid to the SFRA that remain unencumbered for allowable costs in excess of the amount to which the SFRA is finally determined to be entitled remain unexpended by the SFRA,~~ after all regulatory approvals have been obtained and the CERCLA warranty has been issued by the Navy, are funds which may be determined to be excess by the Navy and not authorized to be retained by the SFRA and upon written demand by the Navy, the SFRA must immediately refund to the Navy those ~~additional~~ excess funds.

Section 717. Conveyance of IR Sites 7/18

a. With regard to the conveyance of IR sites 7/18 within Parcel B to the SFRA, the SFRA agrees to accept fee title to such portion of Parcel B following the completion of all of conditions set forth in Appendix "5."

b. To insure SFRA acceptance of fee title to such portion of Parcel B following the completion of all of conditions set forth in Appendix "5," the SFRA shall immediately execute an acceptance in the form set forth as Appendix "6" ("SFRA Acceptance"), of a Navy deed to such portions of Parcel B in the form set forth as Appendix "7" ("Navy Deed"), and deposit

Commented [r5]: Comments withheld; Subject to review of Appendices.

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

such SFRA Acceptance with an escrow agent mutually acceptable to the SFRA and the Navy. Pursuant to specific escrow instructions in the form set forth as Appendix “8” (“Escrow Instructions”), the Escrow Agent may record the Navy Deed and the SFRA Acceptance in accordance with the Escrow Instructions following the completion of all of conditions set forth in Appendix “5.”

Article VIII APPLICABLE LAWS AND REGULATIONS

Section 801. Applicable Law

This Agreement is entered into incident to the implementation of a Federal program. Accordingly, as it may affect the rights, remedies, and obligations of the United States, this Agreement will be governed exclusively by, and be construed only in accordance with Federal law.

Section 802. Governing Regulations

This Agreement shall be enforced and interpreted in accordance with the Federal laws and regulations, directives, circulars, or other guidance cited in this Agreement. This Agreement will be administered according to the following authorities: DoD Directive 3210.6; the Uniform Administrative Requirements for Grants and Cooperative Agreements; other applicable portions of Title 32 of the Code of Federal Regulations, and pertinent OMB Circulars. If the provisions of this Agreement conflict with any such authorities, those authorities will govern.

Section 803. Environmental Protection

Each Party agrees that its performance under this Agreement shall comply with all applicable state, Federal and local environmental laws and regulations.

Article IX PROCUREMENT

Section 901. SFRA Contracts

The SFRA’s acquisition of goods and services to perform this Agreement will comply with the instructions and procedures contained in 32 CFR Section 33.36(b)(1) through (12). The SFRA must not contract with any party that is debarred, suspended, or otherwise excluded from, or ineligible for, participation in Federal assistance programs under Executive Order 12549, “Debarment and Suspension,” and applicable DOD regulations thereunder.

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

Section 902. Preference for Local Residents

a. Preference is allowed in entering into contracts with private entities for services to be performed at a military installation that is affected by closure or alignment under a base closure law. The Secretary of Defense may give preference, consistent with Federal, State, and local laws and regulations, to entities that plan to hire, to the maximum extent practicable, residents of the vicinity of such military installation to perform such contracts. Contracts for which the preference may be given include contracts to carry out environmental restoration activities or construction work at such military installations. Any such preference may be given for a contract only if the services to be performed under the contract at the military installation concerned can be carried out in a manner that is consistent with all other actions at the installation that the Secretary is legally required to undertake.

b. Definition. In this section, the term “base closure law” means the following:

(1) The provisions of title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100-526; 10 U.S.C. 2687 note).

(2) The Defense Base Closure and Realignment Act of 1990, as amended (part A of title XXIX of Public Law 101-510; 10 U.S.C. 2687 note).

c. Applicability - Any preference given under subsection (a) shall apply only to contracts entered into after the base closure law was enacted.

Article X

TERMINATION, ENFORCEMENT, CLAIM AND DISPUTE RESOLUTION

Section 1001. Dispute Resolution

a. Except as otherwise provided in this Agreement, these dispute resolution provisions are the sole recourse of any Party with respect to disputes and the enforcement of any terms of this Agreement.

b. A dispute shall be considered to have arisen when one Party sends the other Party written notice of such dispute. Such written notice will include, to the extent available, all of the following information: the amount of monetary relief claimed or the nature of other relief requested; the basis for such relief, and; any documents or other evidence pertinent to the claim.

c. If a dispute arises under this Agreement, the Parties agree to attempt to resolve the dispute at the staff level. The Parties shall confer at the staff level within fifteen (15) days after a notice of dispute is received. Should staff-level discussions not resolve the dispute

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

1 within such fifteen (15) day period (or longer, if agreed to by the Parties), the Parties agree to
2 elevate the dispute to designated mid-level management. Mid-level management shall then
3 attempt to resolve the dispute within thirty (30) days (or longer, if agreed to by the Parties) after
4 receiving the dispute. If Mid-level management cannot timely resolve the dispute, the Parties
5 agree to then raise the issue with their respective senior-level management. Senior-level
6 management shall then attempt to resolve the dispute within thirty (30) days (or longer, if
7 agreed to by the Parties) after receiving the dispute. Each Party shall have the discretion to
8 determine the person(s) to represent it at any meeting convened under this section.

9
10 d. If the dispute cannot be resolved after exhausting the remedies under Section
11 1001c. above, the dispute shall be appealed to the Director of the Base Realignment and
12 Closure Office at the address indicated in Section 707 above. Such appeal must be written, and
13 contain all of the documentation and arguments necessary for a decision. The Director shall
14 render a decision in a timely manner. If the SFRA disagrees with the Director's decision, the
15 SFRA may, by providing notice to the other Party, pursue whatever remedies that the SFRA
16 may have available at law or in equity.

17
18 e. To the extent that there is a conflict between the Dispute Resolution provisions
19 or process set forth herein and any dispute resolution provisions or process contained in the
20 Federal Facility Agreement applicable to Hunters Point Naval Shipyard (FFA), the dispute
21 resolution provisions and process of the FFA shall control. ~~[need to have the FFA suspended~~
22 ~~during performance of the ETCA]~~

23 24 Section 1002. Enforcement

25
26 Either party may enforce this Agreement according to its terms. Without limiting either
27 party's enforcement rights, the Navy's enforcement rights for material breach by the SFRA, in
28 accordance with the terms of 32 CFR Section 33.43, Enforcement, shall include:

29
30 a. Temporarily withholding cash payments pending correction of the deficiency by
31 the SFRA or Sub-grantee or more severe enforcement action by the awarding agency;

32
33 b. Disallowing (denying both use of funds and matching credit for) all or part of
34 the cost of the activity or action that is not in compliance;

35
36 c. Wholly or partly suspending or terminating the current award for the SFRA's or
37 the Sub-grantee's program. Any award termination will be conducted under Section 1003
38 below.

39
40 d. Withholding further awards under this Agreement; and

41
42 e. Taking other remedies that may be legally available.

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

Section 1003. Termination

a. This Agreement may terminate by its own terms under Section 701 above, or by a party under this Section 1003.

b. Reserved

c. Reserved.

d. If a Party materially breaches this Agreement, the non-breaching party, to preserve its right to terminate, must provide the breaching party with a notice of intent to terminate. The breaching party shall have thirty (30) days to cure the breach, unless a longer period is agreed upon, in writing, by the parties. If the breaching party fails to cure the breach within the thirty (30) day (or longer, if agreed upon) period, then the non-breaching party may, in its discretion, terminate this Agreement no sooner than sixty (60) days after the cure period has expired. The existence of a material breach shall be finally determined under the dispute resolution procedures specified in Section 1001 above.

e. If this Agreement is terminated for reasons other than those set forth in Section 701 above, the SFRA shall immediately:

(1) Stop work;

(2) Place no further subcontracts or orders (referred to as subcontracts in this clause) for materials, services, or facilities;

(3) Terminate all subcontracts;

(4) With approval or ratification to the extent required by the Navy, settle all outstanding liabilities and termination settlement proposals arising from the termination of any subcontracts; any such approval or ratification will be final;

(5) Take any action that may be necessary to protect human health or the environment against imminent and substantial endangerment thereto, or to protect and preserve any Navy-owned property at the ACES, as the Grant Officer may direct; and

(6) Return or cause to be returned to the Navy ~~the any funds held by the SFRA~~ not otherwise committed for allowable costs of payment for work or services performed ~~in accordance wither any third party account holder to the purposes of this Agreement~~ extent that such funds are returned to the SFRA.

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

The SFRA agrees to insert such provisions in its contracts, and to require that such provisions be placed in any subsequent subcontracts between the SFRA's contractors and their subcontractors, so as to effect the provisions above.

f. If this Agreement is terminated under this Section 1003, the status of the parties with respect to environmental conditions at the ACES shall revert to as the status that existed immediately preceding the effective date of this Agreement.

g. A party's right to terminate, and any determination of funds available for reimbursement, under this Section 1003 shall be subject to the dispute resolution procedures in Section 1001 above.

Section 1004. Effects of Suspension and Termination

a. Except for ~~allowable reasonable contractor demobilization~~ costs in accordance with 32 CFR Section 33.22 and the applicable OMB Circulars, any costs to the SFRA resulting from obligations incurred by the SFRA during a suspension, or after termination of payments, are not allowable unless the Navy expressly authorizes them in the notice of suspension or termination, or subsequently authorizes such costs. Any other SFRA costs incurred during suspension or after termination which are necessary and not reasonably avoidable are allowable only if:

(1) the costs result from obligations which were properly incurred by the SFRA before the effective date of suspension or termination, are not in anticipation of it, and, in the case of a termination, cannot be cancelled; and

(2) the costs would be allowable if the Agreement were not otherwise suspended or expired at the end of the funding period in which the termination takes effect.

b. The enforcement remedies specified in this section do not relieve the SFRA or its subcontractors from compliance with 32 CFR Section 33.35, Subpart C, or 32 CFR Part 25, including the restrictions on entering into a covered transaction with any party which is debarred, suspended, or is otherwise excluded from, or ineligible for participation in, Federal assistance programs under Executive Order 12549, "Debarment and Suspension."

Article XI LEGAL AUTHORITY

Section 1101. Legal Authority

The parties hereby represent and warrant that they are under no existing or reasonably foreseeable legal disabilities that would prevent or hinder them from fulfilling the terms and

**HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE
AGREEMENT**

conditions of this Agreement. The parties will promptly notify each other of any legal impediment that arises during the term of this Agreement that may prevent or hinder the party's abilities to perform its duties under this Agreement.

IN WITNESS WHEREOF, and intending to be legally bound hereby, the parties to this Agreement, by their authorized representatives, hereby cause this Agreement to be executed.

SAN FRANCISCO REDEVELOPMENT AGENCY

By: _____

NAME:

TITLE: Director

Dated: _____

THE UNITED STATES OF AMERICA

By: _____

: Mr. Robert Griffin

Assistant Commander for Acquisition, Naval Facilities Engineering Command

Dated: _____